In the Supreme Court

of the

United States

October Term, 1938

No. 485

WALLACE R. FARRINGTON, Governor of the Territory of Hawaii, WILLIAM B. LANGMACK, Attorney General of the Territory of Hawaii, and WILLARD E. GIVENS, Superintendent of Public Instruction of the Territory of Hawaii,

Petitioners,

vs.

T. TOKUSHIGE, et al.,

Respondents.

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The sole question before the Circuit Court of the Ninth Circuit on the appeal taken to that Court by petitioners herein was as to the legality of the Preliminary Injunction granted by the Honorable J. T. DeBolt, Judge of the United States District Court in and for the District and Territory of Hawaii. (Record, pages 130-134.)

A consideration of this question involved the constitutionality of the various acts of the legislature of the Territory of Hawaii concerning foreign language

schools, which acts are set forth in detail in an appendix to the brief of petitioners filed herein. (Appendix to Petitioners' Brief, pages i to xv inclusive.)

A compilation of these statutes is attached to the original petition filed in the District Court of the United States as Exhibit "A." (Record, pages 56-66.)

It will thus be seen that the suits filed in the courts of the Territory of Hawaii, prior to the passage of the Act of 1925 and referred to on page 2 of Petitioner's Petition, are not involved in the present proceeding.

Nor, will the Court concern itself with the Temporary Restraining Order referred to on page 3 of Petitioners' Petition and which Restraining Order was dissolved by the trial court.

The 1920 Federal Commission Survey

On pages 9 and 10 of Petitioners' Brief reference is made to "A survey of education in Hawaii made in 1920 by a Federal Commission," and we notice that the petitioners have forwarded to the Court ten copies of this survey. The survey so extensively referred to in the brief of petitioners forms no part of the record in the case. The respondents had no opportunity of being heard on the subjects involved in the survey and the findings of the Commission are in no sense binding upon these respondents. If, however, this Court should decide to examine this survey, we respectfully ask the Court to consider the addresses of the late Franklin K. Lane, recently Secretary of the Interior, and Philander P. Claxton, Commissioner of Education, on the subject of Americanism, found on pages 142 and 143 of said survey.

REVOCATION OF TEACHERS' CERTIFICATES

The partisan statement of the effect of the foreign language school law of Hawaii, found in petitioners' brief, is so fully answered by the complete resume of the law in the opinion of the Circuit Court of Appeals, that we deem it unnecessary to refer to this subject. But we would, however, call attention to the statement of counsel that a teacher's permit might be revoked for cause, after notice and opportunity to be heard. (Petitioners' Brief, page 11.)

Section 8 of the Act of 1920 provided for such notice and hearing, but this section was amended by Section 5 of the Act of 1923, and Section 8, in part, was re-enacted; but the provision for the notice and hearing was omitted in the later enactment.

Counsel failed, thoughtlessly no doubt, to call attention to this repeal.

ARGUMENT

Former decision of this Court with reference to the fundamental right of parents to control the education of their children.

Counsel for petitioners seemed to misapprehend the principle underlying the decisions in the cases of *Meyer vs. Nebraska,* 262 U. S. 390; *Bartels vs. Iowa and companion cases,* 262 U. S. 404; and *Pierce vs. Society of Sisters,* 268 U. S. 510. As we interpret these decisions, they are based on the fundamental right of "parents and guardians to direct the upbringing and education of children under their control." This right was admirably stated by Mr. Justice Harlan in his dissenting

opinion (in this regard in no wise conflicting with the opinion of the majority) in *Berea College vs. Kentucky*, 211 U. S. 45, quoted in the opinion of the Court below, in this case. (Record, 196-7.)

This right or "liberty" under the Constitution "may not be interfered with under the guise of protecting the public interest by legislative action that is arbitrary or without reasonable relation to some purpose within the competency of the state to enact. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the Court." *Meyers vs. Nebraska*, supra, 390-400.

The Statutes in Question Are Prohibitive—Not Regulatory

Counsel contend that the Nebraska, Iowa, Ohio and Oregon statutes were prohibitory while the statutes of Hawaii are merely regulatory. A statute may be regulatory though its provisions be expressed in prohibitory terms or in mandatory terms or both. The Nebraska, Iowa and Ohio statutes provided that all teaching below certain grades in public and private schools must be in the English language, a mandatory regulation. The Ohio statute further expressly prohibited the teaching of the German language below the eighth grade. The Oregon statute provided that parents and guardians must send the children under their control to the public schools after September 1, 1926.

No attempt was made in the Nebraska, Iowa or Ohio statutes to control the course of study, text books, entrance requirements or qualifications of teachers, nor was there any interference whatsoever with the con-

duct of private schools except that the English language should be the medium of instruction and that foreign languages as such should not be taught below certain grades. These were declared unconstitutional by this court as such laws plainly interfere with the right of a parent to direct and control the education of his child.

The Hawaiian statute goes far beyond these statutes in every essential particular; it takes from the parent of a child attending a foreign language school, all control and direction of the education of his child. Complete control of these schools is given to the Department of Education by the law. (Sec. 396, Record, page 63.)

The effect of the law is to make all these private schools in fact public schools in all but the name, though the public contributes not one cent to their support, indeed, under the provisions of Section 55 of the Organic Act, Revised Laws of Hawaii 1925, page 80, the legislature is prohibited from appropriating public money for the support or benefit of any school not under the exclusive control of the government. They are prohibited from employing a teacher, teaching a subject, using a book, admitting a pupil or engaging in any activity of any nature, unless approved by the Department of Education. Nor can such a school be conducted until a permit is granted and an exorbitant fee paid, a condition not imposed on any other private school in the Territory.

And what is the purpose of the law in giving this complete control of these schools to the Department of Education? The statute reads:

> "Sec. 393 (Record, 62). . . . It is hereby declared that the object of this chapter is to *fully and effectively regulate* the conducting of foreign language schools and the teaching of foreign languages, that the Americanism of the pupil may be promoted. . . . ."

This declaration in the law forecloses discussion as to the object of the law. (*U. S. vs. Starn*, 17 Fed. 435.)

It is alleged in the bill (Par. IV, Record, 14) that there is nothing taught in these foreign language schools that is un-American or contrary to the ideals of democracy, but the teaching in said school inculcates Americanism in the minds of the pupils and a respect for the institutions of the United States. This was not denied by the petitioners, and on the record stands admitted. Nothing is taught that is inimical to the public welfare. The law is neither necessary nor essential to the proper enforcement of the Territory's public school policy. The hours of attendance at these schools are so arranged (they are conducted but one hour a day) as not to interfere with the attendance by the pupils therein of school age, at the public schools, and all such pupils are required to and do attend public schools throughout the term thereof; the Japanese language is not taught in the public schools. (Par. XIa of Bill, Record, 49.)

In the public schools, pupils of respondent's schools follow the same course of study and are taught the same lessons as the other pupils therein. There are many children attending the public schools and other private schools from alien families in this Territory, who do not attend the foreign language schools and whose parents speak little or no English and whose ancestral ideals are foreign to American ideals. Yet

neither the law nor the Department of Education concerns itself with their Americanism beyond what they are taught in the public schools,—the identical instruction received by the children of respondents in the same schools. In the public schools all are taught the same lessons of Americanism and democratic ideals, which are considered sufficient for a majority of the pupils, yet the minority of the pupils, whose parents desire to fit them for the battle of life by teaching them a language which will be of great benefit to them in their after careers, attend the foreign language schools where they are further regulated, controlled, taxed and "democracized" by a paternalistic government, and this, too, in the face of the admitted fact that nothing un-American is taught in the foreign language schools, and the Americanism of the pupils is advanced, not retarded in these schools. Referring to these regulations, the Court below said:

> "We feel quite safe in saying that, if such a system of regulations were enforced by one of our American commonwealths against the American college in which foreign languages are taught, it would shock the conscience of mankind." (Record, 198.)

There seems little justification, indeed, for the solicitude of the school authorities concerning the Americanism of a Japanese child who attends a foreign language school, when no such solicitude is manifested for a Japanese child coming from similar environments who does not attend such a school.

The distribution of the large found raised by taxation of the foreign language schools among selected officers and the profits from the sale of text books by a favored publisher, may be the answer.

In this connection, an observation by Judge Peckham in *Lochner vs. New York,* 198 U. S. 45, seems pertinent. Speaking for the court in a case involving an Act of the State of New York regulating the hours of employes in bakeries, he said:

> "It is impossible for us to shut our eyes to the fact that many laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so, when from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of the statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the constitution must be determined from the natural effect of such statute when put into operation and not their proclaimed purpose."

Counsel insist that the Hawaii statute does not prohibit the teaching of foreign languages, but merely regulates to "a moderate extent, while not interfering in the least with the proper maintenance of these schools or the teaching of foreign languages in them, but on the contrary making them more efficient for their declared main object." (Petitioners' Brief, page 20.)

Section 4 of the Act of 1923 (Sec. 396) (Record, 63) prohibits, after September 1st, 1923, any child from attending a foreign language school until he has completed the first and second grades of the public schools or courses equivalent thereto, and the evident intention of this section is to require that the teaching in the foreign language schools should be in English, as it provides: "All new text books used in elementary for-

eign language schools shall be based upon the principle that the pupil's normal medium of expression is English and shall contain, as far as practicable, English equivalents for foreign words and idioms." The preceding section requires that all teachers of foreign languages shall know how to read, write and speak the English language.

Wherein, in principle, does this statute differ from the Nebraska statute, which required all teaching in all grades to be in English, and prohibited the teaching of a foreign language to a pupil until he has passed the eighth grade? Surely, the constitutionality of a statute of this character is not to be determined by the age of the pupil to whom it applies. If this be the measure, the Hawaii statute is as objectionable as the Nebraska statute.

In *Meyer vs. Nebraska,* supra, it is stated:

> "It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child."

Petitioners may reply that this prohibition applies only until changed by the Department of Education and that it has been modified by the Board to exclude from foreign language schools only children of the kindergarten grade,—an essential grade in the system.

Under powers given by this section to the Board to prescribe these same prohibitions and others,—the Board may, under the powers granted, prescribe regulations which would, in effect, prevent the teaching of foreign languages in all grades. The Board may, at will, adopt a regulation prohibiting the teaching of a

foreign language, say, until a pupil has completed all grades in a public school below the eighth grade. Such a regulation would parallel the Nebraska statute. This regulation counsel would attempt to justify by the same argument. They would say, "foreign language schools have not been abolished, they are merely regulated." Granted this power, who can say when it will not be exercised?

From the spirit and temper shown by the present school authorities of Hawaii throughout, it is a prediction certain of fulfillment, that some such regulation would be among the first adopted, if this statute be sustained by the courts.

As said in the opinion of the lower court:

> "If the powers to legislate be once conceded the time and manner of its exercise is largely a matter of legislative discretion, over which the courts have little or no control." (Record, 199.)

The constitutionality of the statute must be determined by the power conferred, and not by the actions taken by officials under it. The presumption that public officials will do their duty cannot be indulged in determining whether or not the law violates the Constitution. This is a question of power conferred, and what, as in this case, the Board might do under it; and to be valid, the law must meet every test required by the Constitution, even the most extreme.

Eubank vs. Richmond, 226 U. S. 137; *Lochner vs. New York*, supra; *Repolje vs. Little Rock*, 166 Ark. 617, 267 S. W. 353.

In *Pierce vs. Society, etc.*, supra, p. 534, the Court said:

"Under the doctrine of *Meyer vs. Nebraska,* 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

In Oregon, the attempt was made to compel all children to attend the public schools. Wherein is a difference in principle in the Oregon law from that of Hawaii? In Hawaii the attempt is to make these foreign language schools in fact public schools. Under the law, absolute and complete control of these schools is given to the Board of Education, the same body that controls and directs the public schools. The control of one is as broad and all-inclusive as the control of the other, except in the foreign language schools the matter of paying the cost of conducting the schools is generously left to the parent. Not only is the complete control given in every essential particular *eo nomine,* but in order to insure that nothing was overlooked, it is provided:

"All subdivisions and activities under the direction and management or supervision of any foreign language school, whatever language may be used in such subdivision and/or activities, shall be subject to the provisions of this chapter." (Sec. 390, Record, 57.)

If, as decided in *Pierce vs. Society, etc.,* supra, the parent cannot be compelled to submit the education of his child directly to the control of the public school authorities by compelling attendance at the public schools, surely this control cannot be accomplished in the manner attempted in Hawaii. That which the law prohibits directly, may not be done indirectly. (*Little Rock, etc., Ry. vs. Worthen,* 120 U. S. 907.)

The argument of counsel to justify the law because of peculiar conditions in Hawaii, suggested but not shown to exist, is so completely answered by the opinion of the Court below, that further comment is unnecessary.

Unconstitutional Delegation of Police Power

We further insist that the Hawaii law is unconstitutional in that it delegates police power to the Board of Education to be exercised at its discretion (*Yick Wo vs. Hopkins,* 118 U. S. 356; *Noel vs. People,* 187 Ill. 587, 58 N. E. 616), and no standard is furnished by the statute for the guidance of the Board (*Adkins v. Children's Hospital,* 261 U. S. 525).

The Constitutionality of Different Provisions of the Statute

Counsel say that this court should sustain such provisions of the law as may be constitutional, yet fail to point out any such constitutional provisions. They seek to impose on the court the labor of searching out and segregating the good, if any, from the bad. This, we submit, is an implied admission that the provisions of the law are so interdependent that they cannot be segregated, and that the law, as a whole, must fail, as

was held by the court below; otherwise, counsel would have attempted the segregation and pointed out those provisions of the law which do not come under the ban. But we respectfully insist that the law provides a complete system for the control of these schools, for the declared purpose of the Americanism of the pupils, and that the system as a whole, must fall, as it infringes on the liberty guaranteed by the Constitution, and deprives respondents of their property without due process of law.

The sole purpose of the law is the Americanization of the pupils of these schools, though it is admitted that nothing un-American is taught in them. Where a system infringes on the Constitution, a part of the system, though unobjectionable in itself, falls with the system. (*Wolff Pack. Co. vs. Court,* 262 U. S. 552; *Meyer vs. Nebraska,* supra.)

Where one provision of a statute is invalid, the whole must fall, where it is evident that the legislature would not have enacted the one without the other. (*Conolly vs. Union Sewer Pipe Co.,* 184 U. S. 540; *Little Rock, etc., Ry. vs. Worthen,* supra; *Spraigue vs. Thompson,* 118 U. S. 90.)

A subject may be clearly within the police powers but the enactment may be so unreasonable, unnecessary or inappropriate for the accomplishment of the purposes ostensibly disguised, that the court will declare it null and void. (*Dobbins vs. Los Angeles,* 195 U. S. 223.)

We do not contend that the Legislature might not, by a law applicable to all schools, safeguard the health, morals and welfare of the pupils; that it may not proscribe the teaching of anything subversive to our form

of government or which is contrary to the general welfare; but in so doing, the law must not infringe on the constitutional rights of the individual. (*Dobbins vs. Los Angeles,* supra.)

These objects must be accomplished by constitutional methods; a desirable end cannot be promoted by prohibited means. (*Meyer vs. Nebraska,* supra.)

The attempt to justify the law or any part of it, on the ground that it is necessary for the protection of the public health, morals or safety, if such be the position of counsel, must fail.

The provisions of the law have no real or substantial relation to these objects, and the purpose of the law is declared expressly to be otherwise. If such be counsel's position, we answer in the language of the Court in *Mugler vs. Kansas,* 123 U. S. 623, at p. 661.

> "There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, *Sinking Fund Cases,* 99 U. S. 718, . . the courts must obey the Constitution rather than the lawmaking department of the government, and must, upon their own responsibility, determine, whether in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury vs. Madison,* 5 U. S. 1 Cranch, 137, 167, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon

> the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

The Hawaii law, as said by the Court below, "in both spirit and purpose abridges the privileges and immunities of citizens of the United States and deprives them of liberty and property without due process of law."

We respectfully submit that the Writ of Certiorari should be denied.

Dated at Honolulu, this 29th day of June, A. D. 1926.

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Petitioners,

vs.

T. TOKUSHIGE, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF

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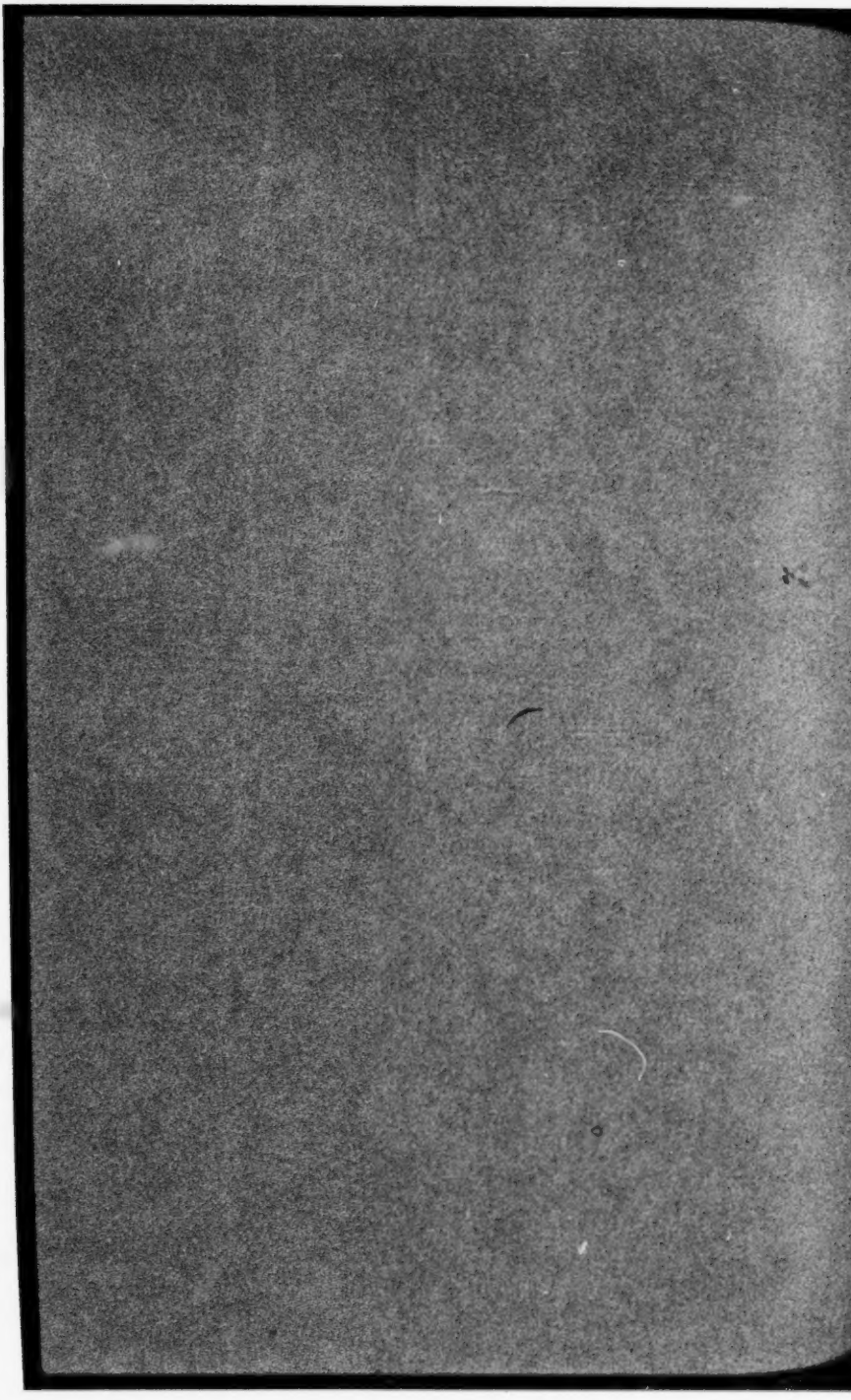

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RESPONDENTS' BRIEF ON WRIT OF CERTIORARI

STATEMENT OF THE CASE

A proper consideration of the question of the constitutionality of Chapter 32 of the Revised Laws of Hawaii of 1925 as amended by Act 152 of the Session Laws of Hawaii of 1925 relating to Foreign Language Schools requires that we should have clearly in mind the situation that obtains in Hawaii relative to its system of schools. An examination of the

law will show that the several schools of the Territory are classified and the different classes defined. These classes are:

1. PUBLIC SCHOOLS. Section 309 of the Revised Laws of Hawaii of 1925, provides as follows:

> "All schools established and maintained by the Department (of Public Instruction) in accordance with law are public schools. All other schools established and conducted in compliance with law are private schools, irrespective of the hours during which the session shall take place."

Section 315, provides as follows:

> "The English language shall be the medium and basis of instruction in all public and private schools within the Territory, *and any school where English is not the medium and basis of instruction shall not be recognized as a public or private school within the provisions of this chapter, and attendance thereat shall not be considered attendance at school in compliance with law.* PROVIDED, however, that the Hawaiian language shall be taught in addition to the English in all normal and high schools of the Territory; and that, where it is desired that another language shall be taught in addition to the English language, such instruction may be authorized by the department, by direct order in any particular instance. PROVIDED, further, that instructions in such courses shall be elective."

Section 324, provides that:

> "The attendance of all children from six to fourteen years of age at either a public or private school is obligatory and it shall be incumbent upon all parents, guardians and others having the responsibility of children of such ages to send them to some such school."

Section 326 provides penalties for non-attendance at school.

II. PRIVATE SCHOOLS. Section 313 provides for the establishment of private schools and is as follows:

"Any person or persons desiring to establish a private school within the Territory of Hawaii shall, prior to the establishment thereof, make an application in writing to the department of public instruction of the Territory, which application shall be signed by the applicant or applicants and shall state in substance (1) the name or names of the person desiring to establish such school; (2) the proposed location thereof; and (3) the course of instruction and the languages in which such instruction is to be given."

"Upon the receipt and approval of such application, the department of public instruction shall issue to the person or persons applying therefor a permit in form to be by it approved, authorizing the establishment of such school; and no private school shall be established within the Territory except in conformity with this chapter."

"Attendance at any school established or maintained without complying with the terms of this section shall not be considered attendance at a public or private school within the meaning of this chapter. The department may, from time to time, require regularly established private schools to submit reports in such form as it may deem proper. Failure to comply with the provisions of this section shall constitute an offense punishable, upon conviction, by a fine not exceeding ten dollars for each offense."

III. FOREIGN LANGUAGE SCHOOLS. The law relating to these schools is contained in Chapter 32 of the Revised Laws of Hawaii, 1925, as amended by Act 152 of the Session Laws of Hawaii of 1925. A copy of the Acts as amended, is attached, as Exhibit "A," to the Bill (*Record pages* 56 *to* 66.)

An examination of these laws shows that attendance at a Foreign Language School (which can be conducted for but one hour per day) is not the equivalent of attendance at a public or private school, and it follows that all the children attending a Foreign Language School must also attend a public or private school.

The Foreign Language Schools are supported and maintained entirely by tuition fees and by private subscription. (*Record page* 49.) The government contributes not a single cent for the support and maintenance of these schools. Indeed, the government is prevented from so doing by the provision of Section 53 of the Organic Act providing as follows:

> ". . . . nor shall any public money be appropriated for the support or benefit of any sectarian, denominational or private school or any school not under the exclusive control of the government."

History of the Foreign Language Schools. The first Foreign Language School was established in April, 1896. It seems that a Japanese Christian minister, the Reverend Okumura, found a little girl at the porch of his church and the reverend gentleman asked her if she had come with her mother. Her reply was

"Me mama hanahana yokonai."

which the reverend gentleman found meant "My mother is working and therefore cannot come." This incident brought home to the clergyman the fact that Japanese children were being brought up in Hawaii with no knowledge of the language of their ancestors; that parents of children could not understand the language of their children nor be understood by them, and this incident led to the establishment of Foreign Language Schools.

From these small beginnings, the Japanese Language Schools increased, until at present there are 146 Japanese Language Schools conducted by more than 5000 persons having property worth $250,000, employing 300 teachers and instructing 20,000 pupils. (*Record pages* 14 *and* 15.) In addition to the reason above given for the establishment of Foreign Language Schools, namely, that the children could not understand the language of their parents nor could the parents understand the language of their children, the necessity for the children of Japanese ancestry being familiar with the language of their ancestors will immediately appear. Practically all the Japanese who emigrated to Hawaii were of the laboring class. They were "hewers of wood and drawers of water"—persons who were accustomed to make a living by the sweat of their brows. When they came to Hawaii, they quickly realized the importance of education, and availed themselves of the opportunities offered by the government to that end. There is no race of people in Hawaii more anxious for the welfare of its children than the Japanese. They not only send their children to the government

schools but avail themselves of the opportunities for higher education; and our high schools and university are largely attended by pupils of the Japanese race.

When these pupils graduate from high school and university, they naturally look around for "white collar jobs," and there is not sufficient employment of this kind to go around. It is, therefore, a matter of vital importance that these children educated in English should have the additional opportunity for success in life afforded them by a knowledge of the Japanese language. A person knowing English and also knowing the Japanese or Chinese languages has a tremendous advantage, especially in the countries of the Pacific, over those being familiar with but one language, and it is largely for this reason that the Japanese of the Territory desired instruction for their offspring in the Japanese language and sent their children to the Japanese Language Schools.

Many of the Japanese Language Schools conduct kindergartens in connection with their schools. (*See paragraph* 6 *of the Petition, pages* 15 *to* 46.) The basic wage of a laborer on the sugar plantations is one dollar per day, and it follows that where a man has a wife and family of children, the family cannot be supported on this wage, and it is necessary for the wife to work in the canefields also. The small children of such parents therefore spend their time when their parents are at work in playing on the public highways, and often associating with very undesirable children. Accordingly, the Japanese Language Schools have provided kindergartens, which act as

a kind of "creche" for these children during the time when their parents are at work. Under the law and the regulation of 1925, these kindergartens must be abolished and the children allowed to play on the public highways, thereby endangering the safety of themselves and others.

Legislative attacks on the schools. In 1919, when many of our young people returned from service with the colors, it was but natural that they should be imbued with a spirit of intense patriotism, and it was likewise but natural that they should seek to "Americanize" the communities in which they dwelt. The experience of the war had shown that very many of our young men who were called to the colors were unable to understand the orders given them in the English language by their officers, and it was with laudable intent that the young people sought to remedy this condition. Accordingly, in the legislative session of 1919, a bill was introduced relating to Foreign Language Schools in the Territory of Hawaii (*House Bill No.* 235, *Legislature of* 1919), containing very drastic provisions against the schools; but the bill was defeated.

THE ACT OF 1920. At a special session of the legislature of the Territory held in 1920, a law was passed relating to "Foreign Language Schools and teachers thereof." This is known as Act 30, Session Laws 1920, and is set forth in full in the appendix to petitioners' brief. An examination of this law shows the following:

(a) It applies to any school conducted in any language other than the English or Hawaiian languages, except Sabbath schools.

(b) No person shall conduct a Foreign Language School unless he has obtained a permit from the Department of Public Instruction so to do.

(c) No person shall teach in a Foreign Language School unless he has obtained a permit so to do from the Department.

(d) No person shall exercise or perform administrative powers at any school without a permit.

(e) No permit to teach shall be granted until the Department is satisfied that the applicant for the same is possessed of the ideals of democracy, knowledge of American history and institutions, and knows how to read, write and speak the English language.

(f) Before issuing a permit to conduct Foreign Language Schools or to teach in such school, the Department shall require the applicant for such permit to sign a pledge to the effect that if granted a permit he will abide by and observe the terms of this law and the regulations and orders of the Department and will direct the minds and studies of his pupils so as to make them good American citizens.

(g) No Foreign Language Schools shall be conducted before the school hours of the public schools nor during the hours when public schools are in session, nor shall any pupil attend a Foreign Language School for more than one hour each day, nor exceeding six hours in any one week, nor exceeding thirty-eight weeks in any school year. The Department is given authority to modify the terms of this requirement if it deems that it can do so consistently with the declared objects of this Act.

(h) The Department shall have full power from time to time to prescribe the course and courses of study and the text books to be used, but no text book shall be furnished at the expense of the Department.

(i) If the Department shall at any time become satisfied that any holder of a permit to conduct a Foreign Language school or teach therein does not possess qualifications required by the Act or shall have violated or failed to observe any of the provisions of the Act or any regulations or orders of the Department, the Department may revoke such permit after notice and the decision of the Department shall be final.

(j) Any person who shall conduct a Foreign Language School or shall teach in a Foreign Language School, contrary to the provisions of the Act, or who shall violate any of the terms thereof, or any of the regulations or orders of the Department, shall upon conviction, be punished by a fine not to exceed $25.00, each day's violation to be deemed a separate offense.

(k) The Act should take effect on the 1st day of July, 1921.

THE REGULATIONS OF NOVEMBER 18, 1922. In November, 1922, the Department of Public Instruction, pretending to act under the powers conferred by Act 30 of the Session Laws of 1920, passed regulations relating to Foreign Language Schools, and under the pretense that they were authorized by that Act, attempted to eliminate the first and second grades of the Foreign Language Schools by providing that no pupil should attend those schools unless

they had satisfactorily completed the first and second grades of the public school courses or courses equivalent thereto. The regulation further provided that after certain dates all new text books used in elementary Foreign Language Schools should be based upon the principle that the pupil's normal medium of expression is English, and shall contain, as far as practicable, English equivalents for foreign words and idioms. The resolution is as follows:

"The Department of Public Instruction, in order to safeguard the health and to promote the Americanism of the pupils of the public schools, and as empowered by Act 30, Session Laws, 1920, hereby adopts, as part of its rules and regulations, the following:

1. The course and courses of study in all foreign language schools shall be based upon the principle that every pupil shall have first satisfactorily completed the first and second grades of the American Public School, or courses equivalent thereto, before attending any foreign language school.

2. The procedure for putting into effect the course and courses of study based upon this principle shall be as follows:

a. Beginning January 1, 1923, and thereafter up to September 1, 1923, every pupil shall have first satisfactorily completed the American public school first grade, or a course equivalent thereto, before attending any foreign language school.

b. Beginning September 1, 1923, and thereafter every pupil shall have first satisfactorily completed the American public school first and second grades, or courses equivalent

thereto, before attending any foreign language school.

3. Beginning September 1, 1923, and thereafter, for grades one, two and three, and beginning September 1, 1923, and thereafter for grades four and above; all new text books used in elementary foreign language schools, shall be based upon the principle that the pupil's normal medium of expression is English and shall contain, as far as practicable, English equivalents for foreign words and idioms.

THE LAW OF 1923. The legislature, in its session of 1923, passed an act relating to Foreign Language Schools, Act 171, which is set forth in full on pages XI to XII of the appendix to petitioners' brief. This Act amended certain sections of Act 30, Session Laws of 1920, and added new provisions.

The following are the principal features of the amendments and additions:

(a) The definition of "Foreign Language Schools" was extended to "all subdivisions and activities under the direction, management or supervision of any Foreign Language School whatever language shall be used in such subdivision and|or activities shall be subject to the provisions of this Act." (Thus making the Act apply to kindergartens and social activities conducted by the Foreign Language Schools.)

(b) After May 5, 1923, all permits theretofore issued should be of no force or effect.

(c) After September 1, 1923, no permit should be issued without a fee being paid therefor based on the school attendance computed on the average at-

tendance of the previous year at the rate of One Dollar per pupil.

(d) On September 1, 1923, and annually thereafter, all permits in order to be valid must be renewed and can only be renewed upon payment of the fees above referred to.

(e) The Department shall not be required to renew a permit for the conduct of a Foreign Language School in the conducting of which there has been a violation of the terms and provisions of this Act.

(f) All fees are to be paid in to the Treasury of the Territory and the money so paid is appropriated to be expended in enforcing and carrying out the provisions of this Act.

(g) If at any time the funds arising from the fees or from royalties, commissions or other means in connection with the sale of Foreign Language School text books shall make it possible, the Department is authorized to reduce the fee of One Dollar.

(h) Every person conducting a Foreign Language School shall file with the Department a sworn list of all pupils in attendance, stating the name, sex, parents or guardians, place of birth and residence of each child, the Department being given the power to modify this requirement.

(i) The object of the Act is declared to be the promotion of the Americanization of the pupils.

(j) The Department is given full power from time to time to prescribe by regulations (1) the subjects and courses of study; (2) the entrance and attendance prerequisites or qualifications of education, age, school attainment, demonstrated mental

capacity, health and otherwise; (3) the text books to be used, and it is also provided that up to September 1, 1923, every pupil shall have first satisfactorily completed the American Public School first grade or a course equivalent thereto before being allowed to further attend any Foreign Language School, and beginning September 1, 1923, and thereafter, every pupil shall have first satisfactorily completed the second American Public School course or course equivalent thereto, before being allowed to attend or further attend the Foreign Language Schools.

(k) After September 1, 1923, for grades one, two and three, and after September 1, 1924, for grades four and above, all new text books shall be based upon the principle that the pupils' normal medium of expression is English and shall contain, as far as practicable, English equivalents for foreign words and idioms.

(l) The Department is authorized to prepare text books for the use of the Foreign Language Schools and to enter into an agreement or agreements for publication and sale of the same. All royalties, commissions and moneys received in connection with the publication and sale of the text books are to be paid into the Treasury and are reappropriated to the Department to be expended for the purpose of this Act.

(m) No subjects of study shall be taught, nor course of study followed, nor entrance or attendance qualifications required, nor text books used, other than as prescribed or permitted by the Department.

(n) The regulations theretofore adopted by the Department and contained in section 7 of this Act shall be in force until superseded in whole or in part by others made by the Department.

(o) The Department is authorized to employ Inspectors of Foreign Language Schools and to inspect the buildings, equipment, records and teaching thereof and the text books used therein.

(p) A permit to conduct a Foreign Language School or to teach therein may be revoked by the Department without a hearing being granted to the licensee.

(q) If any section of the Act shall be declared unconstitutional or invalid, it shall not affect the validity of the Act as a whole.

(r) The Act should take effect upon its approval, May 2, 1923.

THE ACT OF 1925. The legislature of 1925 passed another act relating to Foreign Language Schools, being Act 152 of that session and which is given in full on pages XII to XV of the appendix to petitioners' brief. This Act was amendatory of the Act of 1920 and 1923. The principal amendments are as follows:

(a) After May 10, 1925, and before the first day on which any Foreign Language School shall be conducted in any school year or unexpired part thereof, the fee of One Dollar per pupil shall be paid.

(b) The amount of the fee was to be determined by the Department from such information as it may have.

(c) All officers, teachers, members of any committee or governing board of any Foreign Language School, any corporation or voluntary association of persons, all members or associates of such corporation, association or group, shall be deemed to be participants in conducting such school.

(d) In case any school shall be conducted without the fee being paid, the Territory may recover such fee in a civil action against any person, persons or corporation who or which so conducted or participated in conducting such school, and if the conducting is participated in by a corporation or a voluntary association, a civil action may be brought against such corporation or association in its corporation or association name without joining any of the individual defendants who may be liable for such fee. Process served upon any officer or teacher, or any member of a committee or governing board, or and any member or associate of such school, shall be valid and judgment may be recovered against the corporation or association, and may be enforced against the property of the corporation or the joint property of the members or associates of such association or group and against the individual property of any one of the officers, teachers, members of any committee or governing board, or members or associates of such school, corporation, association or group, who shall have been served with process or who shall have appeared in the action in the same manner and to the same extent as if all had been named as defendants.

(e) The civil and penal remedies provided in the Act shall be concurrent and not exclusive of each other.

(f) No injunction shall issue, nor shall suit be maintained in any court for the purpose of restraining the determination or collection of any such fee or the prosecution of any penal proceeding for the conducting or participating in conducting such school without such fee having been paid.

(g) Any payor of any such fee may pay the same under protest and bring suit for its recovery.

(h) Any person who shall conduct or participate in conducting a Foreign Language School, or who shall teach in a Foreign Language School, contrary to the provisions of the Act, or who shall violate or participate in violating any of the provisions thereof, or of the regulations or orders of the Department, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed $25, each day's violation to be deemed a separate offense.

(i) The Act took effect upon its approval, April 29, 1925.

THE REGULATIONS ADOPTED BY THE DEPARTMENT, JUNE 1, 1925

On June 1, 1925, the Department adopted certain rules and regulations to become effective on and after September 1, 1925. A copy of these regulations is attached to the petition as Exhibit "B." (*Record, pages* 66 *to* 68.)

These regulations provided,

(a) That any Foreign Language School whose text books and course of study are approved by the Department may admit to any grade any pupil who is in regular attendance at any public school of the Territory or any approved private school. (It will be noticed that under the provisions of this Act taken in conjunction with Section 390 of the Laws of 1925, it prevents the Foreign Language Schools from conducting kindergartens as kindergarten pupils do not attend the government schools or schools having an equivalent curriculum.)

(b) The Department approves a primary course of two years and an elementary course of six years.

(c) The Foreign Language Schools may conduct a high school course of two years or more for pupils who have satisfactorily completed the elementary course.

(d) Certain text books to be prepared before September 1, 1925, containing as far as practicable English and Japanese versions of each lesson, are adopted for the first and second grades of the primary grades.

(e) Certain text books are approved for the elementary course, years one to six.

(f) No text book is prescribed for the high school course.

(g) By the end of the second year of the high school course, the pupils should have a reading knowledge of not less than 2000 Chinese characters.

To test the constitutionality of the foregoing statutes and the regulations of the Department of Public Instruction, the petitioners below filed their bill

for an injunction in the District Court of the United States for the District and Territory of Hawaii, (*Record, pages* 3-68), and prayed for the allowance of a preliminary injunction. (*Record, pages* 89-98.)

The defendants objected to the allowance of the preliminary injunction, (*Record, pages* 98-124), but the preliminary injunction was allowed by the Honorable John T. DeBolt, Judge of said United States District Court, on July 21, 1925. (*Record, pages* 128-130.) The preliminary injunction was issued on said last mentioned date. (*Record, pages* 131-133.)

The defendants filed exceptions to the order granting preliminary injunction. (*Recrod, pages* 143-144.)

From the order granting temporary injunction, an appeal from taken to the Circuit Court of Appeals of the Ninth Circuit. (*Record, pages* 149-150.)

The Circuit Court of Appeals of the Ninth Circuit affirmed the judgment of the court below, McCamant, J., dissenting.

And the case is now before this court on certiorari.

ARGUMENT

ACT 30 OF THE SESSION LAWS OF 1920, AS AMENDED BY ACT 171 OF THE SESSION LAWS OF 1923 AND BY ACT 152 OF THE SESSION LAWS OF 1925, IS UNCONSTITUTIONAL AND VOID, AS BEING IN CONTRAVENTION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

I.

THE STATUTE IN QUESTION UNREASONABLY INTERFERE WITH THE FUNDAMENT-

AL RIGHT OF PARENTS AND GUARDIANS TO DIRECT THE UPBRINGING AND EDUCATION OF CHILDREN UNDER THEIR CONTROL.

As we understand the decisions of this court in the case of Meyers vs. Nebraska, 262 U.S. 390, Bartels vs. Iowa and companion cases, 262 U.S. 404, Pierce vs. Society of Sisters, etc., 268 U.S. 510, and the other cases on the subject, hereinafter particularly referred to, the fundamental principle, as therein laid down, is that parents and guardians have the right, guaranteed by the Constitution, to direct the upbringing and education of children under their control, and this right or liberty may not be interfered with by legislative action that is arbitrary or without reasonable relation to some purpose within the competency of the state to enact.

The acts above referred to are valid, if at all, as legislative enactments under the police power of the state. This power, as applied to legislation concerning schools, has frequently been the subject of judicial decision and we beg to call attention to the following cases in which the police power, as relating to education, has been discussed by appellate courts:

COLUMBIA TRUST COMPANY v. LINCOLN INSTITUTE OF KENTUCKY, 138 Ky. 804, 129 S.W. 113.

The commonwealth of Kentucky had passed an act to the effect that it shall be illegal for any person, company, etc., to operate or maintain any industrial school, college or institute where farming or other occupation is taught in its course of study

or instruction, where such person, etc., owns, operates or controls 75 acres of land, unless such person, etc., shall obtain the consent of a majority of the legal voters residing in the voting precinct where such school is to be maintained or operated in the manner provided.

The Lincoln Institute of Kentucky was operating a school for colored persons and owned more than 75 acres of land. The school had certain moneys in the hands of the Columbia Trust Company which it sought to obtain, but was refused by the Trust Company on the ground that the institute had not complied with the provisions of the statute above referred to. The institute then commenced an action against the Trust Company for the recovery of the money on the ground that the statute was unconstitutional. Judgment was obtained in favor of the institute, and an appeal taken to the Supreme Court of Kentucky.

The Court, citing the case of Com. v. Fowler, 96 Ky. 171, 33 L.R.A. 839, 28 S.W. 787, said:

> "Everyone has the right to follow an innocent calling without permission from the government. He may do with his own whatever he pleases, so that he injure no one else. We agree with the learned counsel that 'the doctrine of legislative permission, as a condition precedent to the conduct of any useful or harmless business, is grossly repugnant to those obvious principles of human right which lie at the foundation of just government among men. So, then, without governmental interference or consent, we say the farmer may till his soil, the merchant may buy and sell, the lawyer and the doc-

tor practise their professions, and the druggist and pharmacist compound their medicines.' In the case of Com. v. Bacon, 13 Bush, 210, 26 Am. Rep. 189, there was involved the validity of a statute which provided that it should be unlawful for anyone, without the consent of the directors of the Bourbon County Agricultural Society, to open a lot, stable, shed, or other place during the continuance of the society's fairs, for the purpose of receiving, for pay, horses or vehicles of any kind; or for any person or persons to permit the use of his lot, stable, shed, or place for any such purposes. Among other things, this court said, in the opinion holding the act invalid: 'The effect of the act then is to restrict the right of one person to use and enjoy his property in a particular manner, that another may use his in that manner to greater profit than he could if each was left free to use his own as he pleased. In this country, where the right of the citizen to acquire, hold, and enjoy property is guaranteed by the fundamental law, it would seem that the statement of the proposition is enough to refute it.'

"It is useless to multiply authorities on so obvious a proposition. If the teaching of the young to be useful, upright, Christian citizens is not inimical to the public safety, public morals, or the public health, then it must follow that an act which seeks either to prohibit it, must be invalid. It is difficult to find language to make plainer that which is so obvious as is the proposition before us. The purposes of the institution under discussion include the whole circle of the solid virtues with which youth may be endowed. Undoubtedly, it is a substantial good to educate the youth of the state; and such is the declared

policy of the Constitution. Section 183 provides: 'The general assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state.' It cannot, then, be in any way injurious to the public to aid in forwarding the great educational policy which the people themselves have declared in their fundamental law,—the giving to every young man and woman in the commonwealth a sound education. And when academic education is supplemented by religious training and special instruction in the agricultural and mechanical arts and sciences, it seems to us that it is contrary to the most obvious public policy that an institution which affords such an education should be in any way blocked or impeded. What good reason can be given for prohibiting the exercise of such a charity as that which we have under discussion, unless it can be shown that education, supplemented by religious training, may be in some way an evil to society? Does not the mind of every virtuous and rightthinking person at once admit that the contrary is true? Do we not know that religious educational training has a tendency to make men more industrious, more virtuous, and better generally, morally and physically? In other words, better, wiser, and more useful citizens. What would be thought of an act which prohibited the farmer from cultivating a piece of land of greater extent than 75 acres, without the permission of his neighbors? By what argument could an act be supported which prohibited a manufacturer from working more than a given number of artisans? And yet it is seriously contended that a school which seeks to make religious, upright, educated citizens may be prevented under the

police power of the state as a public nuisance. EDUCATION STRENGTHENS THE MIND, PURIFIES THE HEART, AND WIDENS THE HORIZON OF THOUGHT. IT MAGNIFIES THE DOMAIN OF HOPE, MULTIPLIES THE CHANCES OF SUCCESS IN LIFE, AND OPENS WIDE THE DOOR OF OPPORTUNITY TO THE POOR AS WELL AS TO THE RICH. IT MAKES MEN BETTER HUSBANDS, BETTER FATHERS, AND BETTER CITIZENS."

BEREA COLLEGE v. KENTUCKY, 211 U.S. 43.

In this case the commonwealth of Kentucky enacted a statute providing that

"It shall be unlawful for any person, corporation, etc., to maintain any college, school or institution where persons of the white and colored race are both received as pupils for instruction; and any person, etc., who shall operate any such college, shall be fined $1000."

The college conducted a school in contravention of the term of this statute. It was tried, found guilty, and fined $1000. From the conviction the college appealed to the Supreme Court of Kentucky on the ground that the statute was unconstitutional, but the conviction was affirmed. Error was then taken to the Supreme Court of the United States, which Court affirmed the conviction on the ground that Berea College was a corporation, and therefore its powers under its charter could be modified by the state.

Mr. Justice Harlan wrote a very strong dissenting opinion, in which he was joined by Mr. Justice Day. At the conclusion of the opinion Mr. Justice Harlan says:

"In my judgment the court should directly meet and decide the broad question presented by the statute. It should adjudge whether the statute, as a whole, is or is not unconstitutional, in that it makes it a crime against the state to maintain or operate a private institution of learning where white and black pupils are received, at the same time, for instruction. In the view which I have as to my duty I feel obliged to express my opinion as to the validity of the act as a whole. I am of opinion that, in its essential parts, the statute is an arbitrary invasion of the rights of liberty and property guaranteed by the 14th Amendment against hostile state action, and is, therefore, void.

"The capacity to impart instruction to others is given by the Almighty for beneficent purposes; and its use may not be forbidden or interfered with by government,—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property,—especially, where the services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States. This court has more than once said that the liberty guaranteed by the 14th Amendment embraces 'the right of the citizen to be free in the enjoyment of all his facuties,' and 'to be free to use them in all lawful ways.' Allgeyer v. Louisiana, 165 U. S. 578, 41 L.ed. 832, 17 Sup. Ct. Rep. 427;

Adair v. United States, 208 U. S. 161, 173, 52 L.ed. 436, 442, 28 Sup. St. Rep. 277."

* * * * * * *

"Of course, what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the state and maintained at the public expense. No such question is here presented and it need not be now discussed. My observations have reference to the case before the court, and only to the provision of the statute making it a crime for any person to impart harmless instruction to white and colored pupils together, at the same time, in the same private institution of learning. That provision is, in my opinion, made an essential element in the policy of the statute, and, if regard he had to the object and purpose of this legislation, it cannot be treated as separable nor intended to be separated from the provisions relating to corporations. The whole statute should therefore be held void; otherwise, it will be taken as the law of Kentucky, to be enforced by its courts, that the teaching of black and white pupils at the same time, even in a private institution, is a crime against that commonwealth, punishable by fine and imprisonment.

"In my opinion, the judgment should be reversed upon the ground that the statute is in violation of the Constitution of the United States."

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD v. McKELVIE, 175 N.W. 531.

This was a suit for an injunction by the Lutheran Synod against the Governor of the State of Nebraska to restrain the enforcement of a statute providing that no person shall, in any private, etc., school,

teach any subject to any person in any language other than English, and that languages other than English may be taught as languages only after pupils shall have obtained and successfully passed the eighth grade as evidenced by a certificate of graduation. The court held that the statute in question was constitutional as applied to the government schools, but it also held that the statute would be unconstitutional as applied to the teaching of foreign languages in private schools. The court says:

"The contention made that, by virtue of section 2 of the act, no foreigner may be taught in any other language than English unless the pupil has successfully passed the eighth grade, as evidenced by a certificate issued by the county superintendent, must be taken as applying only to pupils attending public or private schools, and in the sense that a pupil in such schools may not there be taught any language other than English unless he has attained and passed the eighth grade. If the act should be construed to mean that no person could at any time be taught any other language than English unless possessed of a certificate of graduation issued by the county superintendent, it would be discriminatory as being an unreasonable exercise of the police power, and interfering with individual liberty.

"If the law means that parents can teach a foreign language, or private tutors employed by men of means may do so, but that poorer men may not employ teachers to give such instruction in a class or school, it would be an invasion of personal liberty, discriminative, and void, there being no reasonable basis of classification; but

> if such instruction can be given in addition to the regular course, and not so as to interfere with it, then equality and uniformity results, and no one can complain."

The statute in question was held to be constitutional and the case was taken to this court on error, where it was reversed on the authority of Meyer vs. Nebraska, infra, 269 U. S. 404, 67 L.ed. 1047.

MEYER vs. STATE, 187 N.W. 100.

This was a criminal prosecution under a statute of Nebraska wherein the defendant, Meyer, was found guilty of a violation of the Nebraska statute providing that no person shall in any private denominational or parochial public school teach any subject to any person in any language other than the English language and providing that languages other than the English language shall not be taught in such schools until after the pupil has attained and satisfactorily passed the eighth grade. The constitutionality of the act was attacked by Meyer, but the statute was sustained.

Mr. Justice Letton and Chief Justice Morrisey dissented on the seventh paragraph of the syllabus, which paragraph reads as follows:

> "The statute prohibiting the teaching of foreign languages in the schools was intended to prohibit the teaching of such language whenever the pupils of the school should be assembled for the purpose of receiving instruction and was not limited, in its aim, to those school hours only which should be set aside in the teaching of the common school branches."

The dissenting opinion, we think, will appeal to the Court as a clear and succinct statement of the

law, and it embodies the contentions of the petitioners in the case at bar. It seems that in Nebraska, as in Hawaii, the community was suffering from "mob psychology." The dissenting opinion is as follows:

LETTON, J. (dissenting). "Without regard to the conclusion in the case, I dissent from the doctrine of the seventh paragraph of the syllabus and that portion of the opinion expressing the same view. This in effect overrules the very recent opinion of this court in Nebraska District, E.L.S. v. McKelvie, 104 Neb. 93, 175 N.W. 531, 7 A.L.R. 1688. The matter is of grave importance, since it involves the question as to the extent that a Legislature may infringe upon the fundamental rights and liberty of a citizen protected by the state and federal constitutions. I am unable to agree with the doctrine that the Legislature may arbitrarily, through the exercise of the police power, interfere with the fundamental right of every American parent to control, in a degree not harmful to the state, the education of his child, and to teach it, in association with other children, any science or art, or any language which contributes to a larger life, or to a higher and broader culture."

"Educators agree that the period of early childhood is the time that the ability to speak or understand a foreign, or a classic, language is the most easily acquired. Every parent has the fundamental right, after he has complied with all proper requirements by the state as to education, to give his child such further education, in proper subjects as he desires and can afford. As was pointed out in Nebraska District, E.L.S. v. McKelvie, supra, the legitimate object of the

statute has been accomplished when the basic and fundamental education of every child in the state has been acquired in the English language, instead of in the language of a foreign country."

"The state has the right to manage and control in all particulars schools maintained by taxation; to place other schools under state supervision and to require the same general standards; but it has no right to prevent parents from bestowing upon their children a full measure of education in addition to the state required branches. Has it the right to prevent the study of music, of drawing, of handiwork, in classes or private schools, under the guise of police power? If not, it has no power to prevent the study of French, Spanish, Italian or any other foreign or classic language, unless such study interferes with the education in the language of our country, prescribed by the statute."

"In State v. Ferguson, 95 Neb. 63, 73, 144 N.W. 1039, 1043, 50 L.R.A. (N.S.) 265, it is said in the opinion of Judge Fawcett:

> " 'The public school is one of the main bulwarks of our nation, and we would not knowingly do anything to undermine it; but we should be careful to avoid permitting our love for this noble institution to cause us to regard it as 'all in all' and *destroy both the God-given and constitutional right of a parent to have some voice in the bringing up and education of his children.*' "

"We have said that the Legislature cannot, under the guise of police regulation, arbitrarily invade personal rights, and that—

> " 'The test when such regulations are . . . in question is whether they have some relation to the public health or public welfare, and

whether *such is, in fact, the end sought to be attained.*' Smiley v. MacDonald, 42 Neb. 5, 60 N.W. 355, 27 L.R.A. 540, 47 Am. St. Rep. 684; In re Anderson, 69 Neb. 680, 96 N.W. 149, 5 Ann. Cas. 421; Union P.R.Co. v. State 88 Neb. 247, 129 N.W. 290; State v. Withnell, 91 Neb. 101, 135 N.W. 376, 40 L.R.A. (N.S.) 398.'"

"Since the restriction cannot be supported on the ground of 'public welfare,' it is now sought to sustain it on the ground of 'public health.' The supposition that this restriction in the statute might have been inserted in the interest of the health of the child is evidently an afterthought. It was not suggested by counsel either in the briefs or at the hearing. It is patent, obvious, and a matter of common knowledge that this restriction was the result of crowd psychology; that it is a product of the passions engendered by the world war, which had not had time to cool. The idea that the Legislature had in mind the protection of the child from overstudy, or lack of recreation, seems far-fetched, when it is realized that outside of city districts only 12 weeks school attendance in a year is required by the law, and that in city districts the hours of study for young children are carefully limited by the boards of education. The statute was construed and upheld (except as to the restriction now reinstated by the majority opinion) in the opinion in the McKelvie case written by me. It was there held (with that exception) to be a proper and salutary measure, upon substantially the same grounds as are now suggested in the majority opinion. The doctrine of stare decisis should be applied, and the former opinion adhered to.

"Legislatures have not always respected personal rights. In State v. Junkin, 85 Neb. 1, 122 N.W. 473, 23 L.R.A. (N.S.) 839, this court was compelled to hold invalid a law restricting free speech in a public assembly. Resistance to the arbitrary power of kings was necessary in days gone by. It seems now to be necessary to resist encroachments by the Legislature upon the liberty of the citizen protected by the Constitution."

MORRISEY, C. J., concurs in this dissent.

The case was taken to this court on error where it was reversed and the statute held to be unconstitutional. (262 U.S. 390, 67 L.ed. 1042). The court says:

"While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. * * * *"

"The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted. The Ordinance of 1787 declares: 'Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.' Corres-

ponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws."

"Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment."

"The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The supreme court of the state has held that 'the so-called ancient or dead languages' are not 'within the spirit or the purpose of the act.' Nebraska Dist. v. McKelvie, 108 Neb. 448, 187 N.W. 927 (April 19, 1922). Latin, Greek, French, Spanish, Italian, and every other alien speech are within the ban. Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."

"It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals; and 'that the English language should be and become the mother tongue of all children reared in this state.' It is also affirmed that the foreign-born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type, and the public safety is imperilled."

"That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all,—to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution,—a desirable end cannot be promoted by prohibited means.

"For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: 'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior or of the better

when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.' In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between the individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution. The desire of the legislature to foster a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters, is easy to appreciate. Unfortunately experiences during the late war, and aversion toward every characteristic of truculent adversaries, were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. The interference is plain enough, and no adequate reason therefor in time of peace and domestic tranquility has been shown."

"The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. These matters are not within the present controversy. Our concern is with the prohibition approved by the

supreme court. Adams v. Tanner, 244 U. S. p. 594, 61 L. ed, 1342, L.R.A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition, with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary, and without reasonable relation to any end within the competency of the state."

"As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals, or understanding of the ordinary child."

"The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

"Reversed."

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD v. McKELVIE, 187 N.W. 927.

This is a case much relied upon by the defendants. It was an action for an injunction against the enforcement of the Nebraska law, which has been referred to above. It was decided in April, 1922, at a time when the "crowd psychology" referred to by

Mr. Justice Letton, was still rampant in the State of Nebraska. Again there is a dissenting opinion by Chief Justice Morrissey, which we submit is a sound and sane exposition of the law. The dissenting opinion is as follows:

"Chapter 61, Laws of 1921, in the main, is calculated to prohibit and penalize the teaching, in a school, of languages other than English. The history of the ages dead and gone reveals that every forward step in science and philosophy met with opposition and oftentimes with persecution, but, notwithstanding this opposition, learning spread, the human mind expanded, and knowledge of the arts and sciences reached the multitude. We have been wont to look upon the proscriptions of the past with charity because of the age in which they occurred, but, now, in the twentieth century, the majority opinion sustains a statute as a reasonable exercise of the police power that proscribes the teaching of modern languages, in a school, although it sanctions the teaching of such languages if done by a private tutor, or a parent, in the home. If the teaching of such languages is vicious and harmful, it must be so when done by a private tutor, or by a parent, in the home. If not hurtful to the state when taught by a private tutor or by a parent, in the home, how can it be said to be harmful to the state when taught in a school, when such teaching is not permitted to impair the work of the child in the common branches of learning. I cannot regard as a reasonable exercise of the police power a provision which arbitrarily forbids the acquisition of useful learning—learning that is not harmful in itself, learning that the well to do parent may employ

a private tutor to impart to his child, if not done in a school. The police power has never been held to extend to the prohibition of acts not injurious to society or which cannot reasonably be said to be harmful to the public welfare. It is an arbitrary classification which reason will not support. The provision declaring the English language to be the official language of the state and the provisions requiring the teaching of that language in all schools of the state are proper, and no person complains of them or questions their validity, but those provisions that prohibit the teaching of other languages, in a school, even though such teaching does not interfere with the school course prescribed by proper authority, in my judgment, violate the provisions of both the state and federal Constitution. I, therefore, dissent from the holding announced and adhere to the opinion of this court in Nebraska District of Evangelical Lutheran Synod v. McKelvie, 104 Neb. 93, 175 N. W. 531, 7 A.L.R. 1688, and to the dissenting opinion in Meyer v. State, 107 Neb., 187 N.W. 100."
STATE v. FERGUSON, 144 N.W. 1039.

In this case Ferguson had a daughter attending the government school in the State of Nebraska. He desired his daughter to spend whatever time she could, out of school hours, in the study of music, and did not desire her to study domestic science, which was part of the curriculum of her school. The domestic science was taught in a building some distance from the school, and it was necessary for the daughter to walk to the domestic science building for her class in that subject. This, on the instruction of her father, she refused to do and she was ex-

pelled from school. The father thereupon brought mandamus to compel the reinstatement of his daughter. The writ of mandamus was issued and made perpetual in the Nisi Prius Court, which judgment was affirmed on appeal, where it was held that:

> "The right of a parent to make a reasonable selection from the prescribed course of studies which shall be carried by his child in the free public schools of the state is not limited to any particular school nor to any particular grade in any of such public schools."

and again:

> "The public schools of the state are entitled to the earnest and conscientious support of every citizen. To that end the school authorities should be upheld in their control and regulation of our school system, but their power and authority should not be held to be unlimited. They are required to exercise their authority over and their desire to further the best interests of their scholars, with a due regard to the natural and legal rights of the parents of such children." See also People vs. Olmstead, 27 Barb. 9-13-33.

The whole subject of the constitutionality of the statute relating to private schools is summed up, in 24 R.C.L. 562, as follows:

> "While, as already stated, the power of the legislature over public schools is complete, there is no such power in regard to private schools, nor in fact any power at all in so far as the educational features are concerned. The power of the legislature to regulate or prohibit private schools is subject to the same limitations as the power to regulate private property rights in general. The legislature, under the police power, may regulate education in many respects in

private schools. But the exercise of such police power must not be arbitrary, and must be limited to the preservation of the public safety, the public health or the public morals. The legislature has no power to prohibit or to authorize the voters to prohibit the establishment of a private educational institution, unless it be inimical to public health, public safety or public morals. If the private institution be a corporation any act attempting to regulate it by amending its charter, where the power of amendment was not reserved, comes squarely under the decision in the Dartmouth College case."

We desire to especially call the court's attention to the case of *Society of Sisters of the Holy Name of Jesus and Mary vs. Pierce, Governor of Oregon, and others,* and *Hill Military Academy vs. the same,* 296 Fed. 928. This case is so clearly on all fours with the case at bar that we should feel warranted in submitting our case on it together with the Meyer vs. Nebraska case.

These were suits in equity, the object of which was to declare unconstitutional and void the statute of Oregon enacted under the initiative of November 7, 1922, relating to private schools. It was claimed by the plaintiffs that the act was void as in contravention of the Fourteenth Amendment of the Constitution in that "it trenches upon the privileges and immunities of citizens of the United States; that it deprives them of life, liberty and property without due process of law, and the equal protection of the laws and is violative also of that clause of the Constitution relating to the impairment of obligations on contracts." Plaintiffs asked for injunctive relief,

defendants interposed a motion to dismiss and the case came on for hearing in the District Court of Oregon on March 31, 1924, before Gilbert, Circuit Judge, and Wolverton and Bean, District Judges. On page 935 of the Decision, is the following:

"It is not denied that the state, in its sovereign capacity, is entitled to the exercise of what are termed police powers. What these powers are the courts have not attempted to define precisely. But, without question, they relate to the safety, health, morals and general welfare of the public. 'Both property and liberty,' says the court, in Lichner v. New York, 198 U.S. 45, 53 Sup. Ct. 539, 541 (49 L. ed. 937, 3 Ann. Cas. 1133), 'are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.'"

"But there is a limit to the manner in which these powers may be exercised by the state. They cannot be exercised arbitrarily and despotically, nor unless there exists a reasonable relation between the character of the legislation and the policy to be subserved. Nor is the state legislature the final judge of the limitations of the police power. Its enactments will be set aside when found to be unwarranted and arbitrary interference with rights protected by the Constitution in carrying on a lawful business or occupation in the use and enjoyment of property. In other words, the exercise of the police power is subject to judicial review, and property rights cannot be ruthlessly destroyed by wrongful enactment. Silz v. Hesterberg, 211 U. S. 31, 39, 29 Sup. Ct. 10, 53 L. ed. 75; Lawton

v. Steele, 152 U.S. 133, 137, 14 Sup. Ct. 499, 38 L. ed. 385; Dobbins vs. Los Angeles, 195 U.S. 223, 239, 25 Sup. Ct. 18, 49 L. ed. 169."

"In elaboration of the principle, the courts may not, however, because of the mere fact that they differ from the Legislature in its views of public policy, or hold views inconsistent with the propriety of the legislation in question, interfere judicially, nor unless the act in question is unmistakably and palpably in excess of legislative power. McLean v. Aransas, 211 U.S. 539, 547, 29 Sup. Ct. 206, 53 L. ed. 315."

"There are certain known callings and occupations that the state may, under and in pursuance of its police powers, regulate by reasonable interposition; but it cannot prohibit their exercise, where to do so will infringe the guaranties of the Fourteenth Amendment. Thus employment agencies may be regulated, but not prohibited. Adams v. Tanner, 244 U.S. 590, 37 Sup. Ct. 662, 61 L. ed. 1336, L.R.A. 1917F 1163, Ann. Cas. 1917D, 973. The right of the individual to work and earn a livelihood may not be prohibited, though the workman be an alien. Truax v. Raich, supra."

"The right to contract in relation to one's business is a liberty that may not be inhibited without entrenchment upon rights guaranteed by the Fourteenth Amendment. Lochner v. New York, supra; Adkins et al v. Children's Hospital, supra. The right to engage in a useful, legitimate business, not harmful or vicious, is protected under the amendment, and cannot be abrogated. Murphy v. California, 225 U. S. 623, 32 Sup. Ct. 607, 56 L. ed. 1229, 41 L. R. A. (N.S.) 153. And the right to teach German along with the grammar school grades may not be imping-

ed upon under the guise of legislative regulation. Meyer v. Nebraska, supra."

"No one questions the proposition that our public schools are subject to a reasonable supervision of the state through its legislature, in the exercise of its police powers, for safeguarding the health, morals, and general weal of the public. Nor is it disputed that, while parents possess a natural and inherent right to the nurture, control and tutorship of their offspring, that they may be brought up according to the parent's conception of what is right and just, decent, and respectable, and manly and noble in life, the state yet stands in the position of *parens patriae* to and may exercise its just powers 'in preparing the child, in future life, to support itself, to serve the state and in all the relations and duties of adult life to perform well and capably its part.' People v. Ewer, 141 N.Y. 129, 133, 36 N.E. 4, 25 L.R.A. 794, 38 Am. St. Rep. 788; State v. Shorey, 48 Or. 396, 399, 86 Pac. 881, 24 L.R.A. (N.S.) 1121."

"The test here is not as to these primordial and long-established principles, and they are referred to only for clarifying the atmosphere, so that we may proceed intelligently to a discussion of the very crux of the cases at bar. The real test is: Has the state, through its legislative functions, the power under the guise of police regulation, to deprive parochial and private school organizations of the liberty and right to carry on their schools for teaching in the grammar grades?"

"The act could not be more effective for utterly destroying the business and occupation of complainants' schools, except, perhaps, the college and higher preparatory grades, if it had

been entitled 'An Act to prevent parochial and private schools from teaching the grammar grades.' This serves to emphasize the seriousness of the controversy. Indeed the simile is no stronger than the argument for the adoption of the measure put it: 'A divided school can no more succeed than a divided nation.' That such is the purpose of the act is obvious and incontrovertible."

"It cannot be successfully combated that parochial and private schools have existed almost from time immemorial—so long, at least, that their privilege and right to teach the grammar grades must be regarded as natural and inherent, as much so as the privilege and right of a tutor to teach the German language with the grammar grades, as was held in Meyer v. Nebraska, supra. The absolute right of these schools to teach in the grammar grades (paraphrasing somewhat the language of the court in the case just cited), and the right of the parents to engage them to instruct their children, we think, is within the liberty of the Fourteenth Amendment."

The motion was dismissed and a preliminary injunction issued.

The cases were taken to this court on appeals, which court, in affirming the decree below, said:

"Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, 67 L. ed. 1042, 29 A.L.R. 1446, 43 Sup. Ct. Rep. 625, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reason-

able relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 267 U.S. 415. 69 Law. ed. 689.

The Circuit Court of Appeals of the Ninth Circuit, in the decision appealed from in the present case, after reviewing the facts as set forth by the bill, says: 11 Fed. (2nd) 710.

"The appeal now before this court is from that decree (that is, the decree granting temporary injunction). If the legislation complained of is unconstitutional, the right of the appellees to maintain this suit is, in our opinion, not open to question. Pierce v. Society of Sisters, 268 U.S. 510. The right of the pupils, against whom the legislation is directed, to acquire a knowledge of the Japanese language and the right of others to teach them that language is equally beyond question. Meyer v. Nebraska, 262 U.S. 390; Bartels v. Iowa, Id. 404."

"It only remains to consider, then, whether the legislation can be upheld and sustained as a proper exercise of the police power of the territory, and in that connection we must remember that we are not now concerned with the public school system established by the territory and maintained at public expense. These foreign language schools are in no sense a part of that system, as they are maintained through

private enterprise, and attendance upon them is not compulsory. The children who attend them are compelled to and do attend the public schools and fully discharge all their duties and obligations in that regard, and when they have done this, we take it for granted that they have an undoubted right to acquire a knowledge of foreign languages, music, painting, drawing and such other accomplishments, not inimicable to good order and good morals, as their parents or guardians see fit to bestow upon them."

"In Berea College v. Kentucky, 211 U. S. 45, a majority of the court held that a state might withhold from its corporations, privileges and immunities which it could not constitutionally withhold from individuals, and affirmed the judgment of the Supreme Court of the State. In a dissenting opinion, conflicting in no wise with the opinion of the majority, Mr. Justice Harlan said:

" 'The capacity to impart instruction to others is given by the Almighty for beneficent purposes and its use may not be forbidden or interfered with by Government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property—especially, where the services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the constitution of the United States. This court has more than once said that the liberty guaranteed by the Fourteenth Amendment embraces

"the right of the citizen to be free in the enjoyment of his faculties," and "to be free to use them in all lawful ways." * * * If pupils, of whatever race—certainly, if they be citizens—choose with the consent of their parents or voluntarily to sit in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether Federal or State, can legally forbid their coming together, or being together temporarily, for such an innocent purpose.' "

"Comprehensive and all pervading as the police power is, there are certain rights and certain relations beyond its scope. One of these is the right of a parent to educate his own child in his own way, at least beyond the requirements of the local law. Conceding then, as we must, that the appellees have a right to maintain these foreign language schools; that teachers have a right to teach therein, and that pupils have a right to be taught, how can these comprehensive regulations and prohibitions be sustained?"

"Before obtaining a permit to teach, the applicant must satisfy a territorial officer that he is possessed of the ideals of democracy, a knowledge of American history and institutions, and knows how to read, write and speak the English language. A knowledge of the foreign language is not a prerequisite. He must pledge himself to abide by and observe the terms of the Act and such regulations and orders as the department may see fit to make, and he and his pupils must use only such text books as are compiled and sold by legislative authority. He must so direct the minds and studies of his pupils as will tend to make them good and loyal American citizens,

and this he must accomplish after the pupil has completed the second grade in the common schools, and within one brief hour each day, for not exceeding six days a week and thirty-eight weeks in the year. In other words, in a school conducted primarily for the teaching of a foreign language the pupil must take a course in Americanism; a course not required of any other class of citizens or students. We feel quite safe in saying that if such a system of regulations were enforced by one of our American commonwealths against an American college in which foreign languages are taught, it would shock the conscience of mankind. An attempt is made to justify the Act, however, because of the peculiar conditions prevalent on the Islands. They have a large Japanese population there and it is said that within the next fifteen years a majority of the electorate will be American citizens of Japanese extraction. It is further said that the Japanese do not readily assimilate with other races; that they still adhere to their own ideals and customs and are still loyal to their Emperor. It is a matter of common knowledge that the Japanese do not readily assimilate with other races and especially with the white race. This is in part a matter of choice and in part a matter of necessity, because one cannot assimilate alone. No doubt, the Japanese tongue will be spoken on the Isands for generations yet to come, and no doubt the Japanese will be slow to give up their customs and their ideals, but we took the Islands cum onere and extended the Constitution of the United States there, and every American citizen has a right to invoke its protection. You cannot make good citizens by oppression or by a denial of constitutional

rights, and we find no such conditions there as will justify a departure from the fundamental principles of constitutional law. If the power to so legislate is once conceded, the time and manner of its exercise is largely a matter of legislative discretion over which the courts have little or no control. An attempt was made to justify the foreign language school laws of Nebraska, Iowa and Ohio on similar grounds, but the attempt was unsuccessful."

"'It is said the purpose of the legislation was to promote civil development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals; and "that the English language should be and become the mother tongue of all children reared in this State.' It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

"'That the State may do much, go very far, indeed in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desir-

able end cannot be promoted by prohibited means.' Meyer v. Nebraska, supra."

"For these reasons we are of opinion that the Act in question, in both spirit and purpose, abridges the privileges and immunities of citizens of the United States, and deprives them of liberty and property without due process of law."

"The decree is affirmed."

On this question we have no hesitancy in herewith submitting extracts from the annual address of the Honorable Cordenio A. Severance, former President of the American Bar Association, delivered September, 1922, in San Francisco, on the subject of "The Constitution and Individualism." Among other things the honored gentleman said:

"The wise men who wrote the Constitution did not intend to place the citizen in leading strings. The government is the servant of the people. It is instituted, not to suppress, but to render certain liberties. The constitutions, both federal and state are full of provisions setting bounds to what their respective legislatures may do. In spite of these limitations, the growth of the so-called police power in these later days is a matter of profound concern to all lovers of our country. If legislators are permitted to run riot under the pretended exercise of this power, the constitutional guarantee for the protection of liberty and property will be destroyed."

"If a legislature can by a simple resolution, declare that a business or occupation never before deemed to be affected with a public interest and thus subject to regulation, is in fact so affected, what limits are there to what it may do? The enlargements of the scope of the police

power in recent years has gone far in the direction of a communistic state."

"If we believe in the principles upon which our government was founded, we should scrutinize with jealous care new proposals which affect the liberty of personal action, to see whether they square with the ancient doctrines voiced by our fathers in the Constitution."

We also respectfully call the court's attention to a portion of the address delivered September 2, 1925, at the Annual Meeting of the American Bar Association by the Honorable Charles E. Hughes, former President of the Association, on the subject of Liberty and Law, as follows:

"Yet it is with respect to the freedom of learning that we find a disposition to impose restrictions which cannot fail to give us grave concern. * * * *

"While with a different purpose, we observe the manifestations of the same spirit in the efforts to interfere with instruction in our schools, not to promote the acquisition of knowledge, but to obstruct it. The Supreme Court of the United States has had occasion to deal with such an attempt to control teaching in private schools. Under a statute, forbidding the teaching of any other than the English language to a pupil who had not passed the eighth grade, a teacher was subjected to a criminal prosecution for teaching the German language. Even the Court, with its necessarily limited judicial vision, could see what lay behind such an enactment and condemned it as an unwarranted interference with the constitutional guarantee of liberty. 'Evidently,' said the Court, 'the legislature has attempted materially to interfere with the calling of mod-

ern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own children.' The statute as applied was found to be arbitrary and without reasonable relation to any end within the competency of the state. The same principle was applied in the Oregon School case where the statute under review in substance attempted to interfere with the privilege of instruction in private schools. 'The child,' said the Supreme Court, 'is not the mere creature of the State. Those who nurture him and direct his destiny have the right coupled with the high duty to recognize and prepare him for additional obligations.' Manifestly the purpose of the statute was not to aid education, but arbitrarily to interfere with the freedom of instruction."

The Oregon School case is discussed in a very interesting article in the November number of the Bar Association Journal, entitled "Islam and the Oregon School Case," to which we respectfully call the court's attention.

II

THE STATUTES IN QUESTION ARE PROHIBITIVE—NOT REGULATORY

Counsel contend that the Nebraska, Iowa, Ohio and Oregon statutes were prohibitory while the statutes of Hawaii are merely regulatory. A statute may be regulatory though its provisions be expressed in prohibitory terms or in mandatory terms or both. The Nebraska, Iowa and Ohio statutes provided that all teaching below certain grades in public and private schools must be in the English language, a mandatory regulation. The Ohio statute further ex-

pressly prohibited the teaching of the German language below the eighth grade. The Oregon statute provided that parents and guardians must send the children under their control to the public schools after September 1, 1926.

No attempt was made in the Nebraska, Iowa or Ohio statutes to control the course of study, text books, entrance requirements or qualifications of teachers, nor was there any interference whatsoever with the conduct of private schools except that the English language should be the medium of instruction and that foreign languages as such should not be taught below certain grades. These were declared unconstitutional by this court as such laws plainly interfere with the right of a parent to direct and control the education of his child.

The Hawaiian statute goes far beyond these statutes in every essential particular; it takes from the parent of a child attending a foreign language school, all control and direction of the education of his child. Complete control of these schools is given to the Department of Education by the law. (Sec. 396, Record, page 63.)

The effect of the law is to make all these private schools in fact public schools in all but the name, though the public contributes not one cent to their support. Indeed, under the provisions of Section 55 of the Organic Act, Revised Laws of Hawaii, 1925, page 80, the legislature is prohibited from appropriating public money for the support or benefit of any school not under the exclusive control of the government. They are prohibited from employing a

teacher, teaching a subject, using a book, admitting a pupil or engaging in any activity of any nature, unless approved by the Department of Education. Nor can such a school be conducted until a permit is granted and an exorbitant fee paid, a condition not imposed on any other private school in the Territory.

And what is the purpose of the law in giving this complete control of these schools to the Department of Education? The statute reads:

> "Sec. 393 (Record, 62). . . . . It is hereby declared that the object of this chapter is to *fully and effectively regulate* the conducting of foreign language schools and the teaching of foreign languages, that the Americanism of the pupil may be promoted. . . . ."

This declaration in the law forecloses discussion as to the object of the law. (U. S. vs. Starn, 17 Fed. 435.)

It is alleged in the bill (Par. IV, Record, 14) that there is nothing taught in these foreign language schools that is un-American or contrary to the ideals of democracy, but the teaching in said school inculcates Americanism in the minds of the pupils and a respect for the institutions of the United States. This was not denied by the petitioners, and on the record stands admitted. Nothing is taught that is inimical to the public welfare. The law is neither necessary nor essential to the proper enforcement of the Territory's public school policy. The hours of attendance at these schools are so arranged (they are conducted but one hour a day) as not to interfere with the attendance by the pupils therein of school age, at the public schools, and all such pupils are

required to and do attend public schools throughout the term thereof; the Japanese language is not taught in the public schools. (Par. XIa of Bill, Record, 49.)

In the public schools, pupils of respondents' schools follow the same course of study and are taught the same lessons as the other pupils therein. There are many children attending the public schools and other private schools from alien families in this Territory, who do not attend the foreign language schools and whose parents speak little or no English and whose ancestral ideals are foreign to American ideals. Yet neither the law nor the Department of Education concerns itself with their Americanism beyond what they are taught in the public schools,—the identical instruction received by the children of respondents in the same schools. In the public schools all are taught the same lessons of Americanism and democratic ideals, which are considered sufficient for a majority of the pupils, yet the minority of the pupils, whose parents desire to fit them for the battle of life by teaching them a language which will be of great benefit to them in their after careers, attend the foreign language schools where they are further regulated, controlled, taxed and "democracized" by a paternalistic government, and this, too, in the face of the admitted fact that nothing un-American is taught in the foreign language schools, and the Americanism of the pupils is advanced, not retarded in these schools. Referring to these regulations, the Court below said:

"We feel quite safe in saying that, if such a system of regulations were enforced by one of our American commonwealths against the American college in which foreign languages are taught, it would shock the conscience of mankind." (Record, 198.)

There seems little justification, indeed, for the solicitude of the school authorities concerning the Americanism of a Japanese child who attends a foreign language school, when no such solicitude is manifested for a Japanese child coming from similar environments who does not attend such a school.

The distribution of the large fund raised by taxation of the foreign language schools among selected officers and the profits from the sale of text books by a favored publisher, may be the answer.

In this connection, an observation by Judge Peckham in *Lochner vs. New York*, 198 U.S. 45, seems pertinent. Speaking for the court in a case involving an Act of the State of New York regulating the hours of employes in bakeries, he said:

"It is impossible for us to shut our eyes to the fact that many laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so, when from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of the statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the constitution must be determined from the natural effect

of such statute when put into operation and not their proclaimed purpose."

Section 4 of the Act of 1923 (Sec. 396) (Record, 63) prohibits, after September 1st, 1923, any child from attending a foreign language school until he has completed the first and second grades of the public schools or courses equivalent thereto, and the evident intention of this section is to require that the teaching in the foreign language schools should be in English, as it provides: "All new text books used in elementary foreign language schools shall be based upon the principle that the pupil's normal medium of expression is English and shall contain, as far as practicable, English equivalents for foreign words and idioms." The preceding section requires that all teachers of foreign languages shall know how to read, write and speak the English language.

Wherein, in principle, does this statute differ from the Nebraska statute, which required all teaching in all grades to be in English, and prohibited the teaching of a foreign language to a pupil until he has passed the eighth grade? Surely, the constitutionality of a statute of this character is not to be determined by the age of the pupil to whom it applies. If this be the measure, the Hawaii statute is as objectionable as the Nebraska statute.

In *Meyer vs. Nebraska,* supra, it is stated:

"It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child."

Petitioners may reply that this prohibition applies only until changed by the Department of Education and that it has been modified by the Board to exclude from foreign language schools only children of the kindergarten grade,—an essential grade in the system.

Under powers given by this section to the Board to prescribe these same prohibitions and others,—the Board may, under the powers granted, prescribe regulations which would, in effect, prevent the teaching of foreign languages in all grades. The Board may, at will, adopt a regulation prohibiting the teaching of a foreign language, say, until a pupil has completed all grades in a public school below the eighth grade. Such a regulation would parallel the Nebraska statute. This regulation counsel would attempt to justify by the same argument. They would say, "foreign language schools have not been abolished, they are merely regulated." Granted this power, who can say when it will not be exercised?

From the spirit and temper shown by the present school authorities of Hawaii throughout, it is a prediction certain of fulfillment, that some such regulation would be among the first adopted, if this statute be sustained by the courts.

As said in the opinion of the lower court:

> "If the powers to legislate be once conceded the time and manner of its exercise is largely a matter of legislative discretion, over which the courts have little or no control. (*Record*, 199.)

The constitutionality of the statute must be determined by the power conferred, and not by the actions taken by officials under it. The presumption

that public officials will do their duty cannot be indulged in determining whether or not the law violates the Constitution. This is a question of power conferred, and what, as in this case, the Board might do under it; and to be valid, the law must meet every test required by the Constitution, even the most extreme.

Eubank vs. Richmond, 226 U.S. 137; *Lochner vs. New York,* supra; *Repolje vs. Little Rock,* 166 Ark. 617, 267 S.W. 353.

In *Pierce vs. Society, etc.,* supra, p. 534, the Court said:

> "Under the doctrine of *Meyer vs. Nebraska,* 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

In Oregon, the attempt was made to compel all children to attend the public schools. Wherein is a difference in principle in the Oregon law from that of Hawaii? In Hawaii the attempt is to make these

foreign language schools in fact public schools. Under the law, absolute and complete control of these schools is given to the Board of Education, the same body that controls and directs the public schools. The control of one is as broad and all-inclusive as the control of the other, except in the foreign language schools the matter of paying the cost of conducting the schools is generously left to the parent. Not only is the complete control given in every essential particular *eo nomine,* but in order to insure that nothing was overlooked, it is provided:

> "All subdivisions and activities under the direction and management or supervision of any foreign language school, whatever language may be used in such subdivision and/or activities, shall be subject to the provisions of this chapter." (Sec. 390, Record, 57.)

If, as decided in *Pierce vs. Society, etc.,* supra, the parent cannot be compelled to submit the education of his child directly to the control of the public school authorities by compelling attendance at the public schools, surely this control cannot be accomplished in the manner attempted in Hawaii. That which the law prohibits directly, may not be done indirectly. (*Little Rock, etc., Ry. vs. Worthen,* 120 U.S. 907.)

III

THE CONSTITUTIONALITY OF DIFFERENT PROVISIONS OF THE STATUTE

Counsel say that this court should sustain such provisions of the law as may be constitutional. This, we submit, is an implied admission that the provisions of the law are so interdependent that they cannot be segregated, and that the law, as a

whole, must fail, as was held by the court below. But we respectfully insist that the law provides a complete system for the control of these schools, for the declared purpose of the Americanism of the pupils, and that the system as a whole, must fall, as it infringes on the liberty guaranteed by the Constitution, and deprives respondents of their property without due process of law.

The sole purpose of the law is the Americanization of the pupils of these schools, though it is admitted that nothing un-American is taught in them. Where a system infringes on the Constitution, a part of the system, though unobjectionable in itself, falls with the system. (*Wolff Pack. Co. vs. Court,* 262 U.S. 552; *Meyer vs. Nebraska,* supra.)

Where one provision of a statute is invalid, the whole must fall, where it is evident that the legislature would not have enacted the one without the other. (*Conolly vs. Union Sewer Pipe Co.,* 184 U.S. 540; *Little Rock, etc., Ry. vs. Worthen,* supra; *Spraigue vs. Thompson,* 118 U.S. 90.)

A subject may be clearly within the police powers but the enactment may be so unreasonable, unnecessary or inappropriate for the accomplishment of the purposes ostensibly disguised, that the court will declare it null and void. (*Dobbins vs. Los Angeles,* 195 U.S. 223.)

We do not contend that the Legislature might not, by a law applicable to all schools, safeguard the health, morals and welfare of the pupils; that it may not proscribe the teaching of anything subversive to our form of government or which is contrary to

the general welfare; but in so doing, the law must not infringe on the constitutional rights of the individual. (*Dobbins vs. Los Angeles,* supra.)

These objects must be accomplished by constitutional methods; a desirable end cannot be promoted by prohibited means. (*Meyer vs. Nebraska,* supra.)

The attempt to justify the law or any part of it, on the ground that it is necessary for the protection of the public health, morals or safety, if such be the position of counsel, must fail.

The provisions of the law have no real or substantial relation to these objects, and the purpose of the law is declared expressly to be otherwise. If such be counsel's position, we answer in the language of the Court in *Mugler vs. Kansas,* 123 U.S. 623, at p. 661:

> "There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, *Sinking Fund Cases,* 99 U.S. 718, . . the courts must obey the Constitution rather than the lawmaking department of the government, and must, upon their own responsibility, determine, whether in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury vs. Madison,* 5 U.S. 1 Cranch, 137, 167, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are

not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

IV

UNCONSTITUTIONAL DELEGATION OF POLICE POWER

We further insist that the Hawaii law is unconstitutional in that it delegates police power to the Board of Education to be exercised at its discretion (*Yick Wo vs. Hopkins,* 118 U.S. 356; *Noel vs. People,* 187 Ill. 587, 58 N.E. 616), and no standard is furnished by the statute for the guidance of the Board (*Adkins v. Children's Hospital,* 261 U.S. 525).

V

THE 1920 FEDERAL COMMISSION SURVEY

On pages 3, 4, 11, 12 and 13 of Petitioners' Brief reference is made to "A survey of education in Hawaii made in 1920 by a Federal Commission," and we notice that the petitioners have forwarded to the Court ten copies of this survey. The survey so extensively referred to in the brief of petitioners forms no part of the record in the case. The respondents had no opportunity of being heard on the subjects in-

volved in the survey and the findings of the Commission are in no sense binding upon these respondents. If, however, this Court should decide to examine this survey, we respectfully ask the Court to consider the addresses of the late Franklin K. Lane, recently Secretary of the Interior, and Philander P. Claxton, Commissioner of Education, on the subject of Americanism, found on pages 142 and 143 of said survey.

VI

TEACHERS' EXAMINATIONS. The law provides that all teachers employed in the Foreign Language Schools before receiving a permit shall satisfy the Department that they are possessed of the ideals of democracy, a knowledge of American history and institutions, and an ability to speak, read and write the English language, and before a teacher can receive a permit to teach in the Foreign Language Schools, he must pass an examination in these subjects. Not only must the teachers be so qualified, but those performing any administrative function with regard to the Japanese Language Schools are classified as teachers. (*Act of* 1923, *page* 123.) Those who perform administrative functions with reference to the schools are often people of the laboring class, plantation workers, fishermen, etc., and of course, are not educated in American ideals, principles of democracy and American history, nor are they, as a rule, able to speak, read and write the English language. As to the teachers, they are not employed to teach American history, principles of democracy or the English language. They are employed to teach the children how to read, write and speak

the Japanese language. The ability to speak, read and write English is a matter of no value in the Japanese Language Schools, and it makes no difference how many people receive licenses from the government after examination in the subjects named in the statute. From the brief of appellate, it would appear there are hundreds of persons qualified to teach in the Japanese Language Schools. There may be hundreds of persons who can pass examinations in the English language and in the ideals of democracy and American history and institutions and yet who are absolutely unable to teach the Japanese language. Indeed, they are as little qualified to so teach as the gentleman who prepared the government text book with its numerous errors.

VII

PECULIAR CONDITIONS IN HAWAII

The argument of counsel to justify the law because of peculiar conditions in Hawaii, suggested but not shown to exist, is so completely answered by the opinion of the court that further comment seems to be unnecessary. We wish to point out, however, that if there are peculiar circumstances in Hawaii relating to our foreign born population, there were similar circumstances in Nebraska and Ohio which were urged in support of the constitutionality of the acts relating to education in those states; but these peculiar circumstances did not deter this court from declaring the acts to be unconstitutional.

CONCLUSION

The Hawaiian law relating to foreign language schools, as said by the court below: "In both spirit

and purpose abridges the privileges and immunities of citizens of the United States and deprives them of liberty and property without due process of law."

We respectfully submit that the judgment of the Circuit Court of Appeals of the Ninth Circuit, declaring these statutes to be unconstitutional, should be affirmed.

Dated at Honolulu, this 23rd day of December, 1926.

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